Supreme Court, U.S.
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No. 02-

IN THE

Supreme Court of the United States

STEVEN J. ALBRECHTSEN,

Petitioner,

v.

BOARD OF REGENTS OF THE
UNIVERSITY OF WISCONSIN SYSTEM,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Did the court of appeals exceed its authority under the Reexamination Clause of the Seventh Amendment and the decisions of the Supreme Court, when as a consequence of the court's disapproval of the style of petitioner's appellate brief it ignored substantial credible evidence supporting the jury's verdict, in the record and cited by petitioner, and on that basis reversed the judgment entered by the district court?

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Opinions and Orders Below

The Opinion of the United States Court of Appeals for the Seventh Circuit, *Albrechtsen v. Board of Regents of the University of Wisconsin System, et al.*, Nos. 01-3577, 01-3791 & 01-4197 (7th Cir. Oct. 23, 2002), is reported at 309 F.3d 433, and is reprinted at App. 1a. The Memorandum and Order of the United States District Court for the Western District of Wisconsin, awarding attorneys' fees and costs, entered November 9, 2001, is unreported but is reprinted at App. 17a. The Memorandum and Order of the district court, denying defendant's motion for judgment as a matter of law and denying defendant's motion for a new trial except for a remittitur on damages, entered September 7, 2001, is unreported but is reprinted at App. 22. The order of the court of appeals, entered December 13, 2002, denying the petition for rehearing and rehearing en banc dated November 6, 2002, is unreported but is reprinted at App. 30a.

Statement of the Basis for Jurisdiction

The Supreme Court has jurisdiction to review a case from a United States court of appeals under 28 U.S.C. § 1254(1).

Constitutional Provision and Rules Involved in the Case

1. The Seventh Amendment to the United States Constitution, in pertinent part, states:

> Article VII.
>
> In Suits at common law, . . . the right of trial by jury shall be preserved, and no fact tried by a

jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

2. Fed. R. Civ. P. 50, in pertinent part, states as follows:

Judgment as a Matter of Law in Jury Trials; Alternative Motion for New Trial; Conditional Rulings

(a) Judgment as a Matter of Law.

(1) If during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may determine the issue against that party and may grant a motion for judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue.

(2) Motions for judgment as a matter of law may be made at any time before submission of the case to the jury. Such a motion shall specify the judgment sought and the law and the facts on which the moving party is entitled to the judgment.

(b) Renewing Motion for Judgment After Trial; Alternative Motion for New Trial. If, for any reason, the court does not grant a motion for judgment as a matter of law made at the close of all the evidence, the court is considered to have submitted the action to the jury subject to the

court's later deciding the legal questions raised by the motion. The movant may renew its request for judgment as a matter of law by filing a motion no later than 10 days after entry of judgment -- and may alternatively request a new trial or join a motion for a new trial under Rule 59. In ruling on a renewed motion, the court may:

(1) if a verdict was returned:

(A) allow the judgment to stand,

(B) order a new trial, or

(C) direct entry of judgment as a matter of law; or

(2) if no verdict was returned:

(A) order a new trial, or

(B) direct entry of judgment as a matter of law.

3. Fed. R. Civ. P. 59, in pertinent part, states as follows:

New Trials; Amendment of Judgments

(a) Grounds. A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States; . . . .

4. Fed. R. App. P. 28, in pertinent part, states as follows:

> Briefs (a) Appellant's Brief. The appellant's brief must contain, under appropriate headings and in the order indicated:
>
> * * *
>
> (7) a statement of facts relevant to the issues submitted for review with appropriate references to the record (see Rule 28(e));
>
> * * *
>
> (b) Appellee's Brief. The appellee's brief must conform to the requirements of Rule 28(a)(1)-(9) and (11), except that none of the following need appear unless the appellee is dissatisfied with the appellant's statement:
>
> * * *
>
> (4) the statement of the facts;
>
> * * *
>
> (e) References to the Record. References to the parts of the record contained in the appendix filed with the appellant's brief must be to the pages of the appendix. If the appendix is prepared after the briefs are filed, a party referring to the record must follow one of the methods detailed in Rule 30(c). If the original record is used under Rule 30(f) and is not consecutively paginated, or if the brief refers

to an unreproduced part of the record, any reference must be to the page of the original document. For example:

- Answer p. 7;

- Motion for Judgment p. 2;

- Transcript p. 231. Only clear abbreviations may be used.

* * *

Statement of the Case

The action was commenced October 5, 2000 by the filing of the Complaint in the United States District Court for the Western District of Wisconsin, as Case No. 00-C-0597-S. R.2. The district court had jurisdiction pursuant to 28 U.S.C. § 1331, regarding federal questions arising under Title VII of the Civil Rights Act of 1964, as amended (42 U.S.C. §§ 2000e *et seq.*), and 42 U.S.C. § 1983. The case was assigned to the Honorable John C. Shabaz, United States District Judge. The district court ruled on various pretrial motions, including a motion to dismiss and a motion for summary judgment. R.34 and R.45. The plaintiff's claims under Title VII were heard and decided in a trial by jury, commencing with jury selection on June 25, 2001 and ending with the jury's verdict on June 28, 2001. R.77 and R.85. A judgment on the verdict was entered in favor of the plaintiff and against defendant Board of Regents of the University of Wisconsin System on June 28, 2001. R.86. The district court ruled on defendant's post-verdict motions under Fed. R. Civ. P. 50(b) and 59 and plaintiff's motion for attorneys' fees and

costs. App. 22a and App. 17a. The court's final amended judgment was entered November 13, 2001, awarding the plaintiff $118,101.00 in attorneys' fees and taxable costs, in addition to damages in favor of the plaintiff in the sum of $143,840. R.124 and R.112. A timely Notice of Appeal to the United States Court of Appeals for the Seventh Circuit was filed by the defendant on December 7, 2001. Oral argument in the court of appeals was on September 6, 2002, and on October 23, 2002, the appellate court issued its opinion reversing the judgment of the district court. App. 1a - App. 16a. On the November 6, 2002, petitioner Steven J. Albrechtsen filed a timely petition for rehearing and rehearing en banc. App. 31a. The petition was denied on December 13, 2002. App. 30a. This Petition for a Writ of Certiorari has been timely filed.

The simplest and clearest recantation of the relevant facts in this case is set forth in the opinion of Judge Wood. *See* App. 9a - App. 16a (Diane P. Wood, Circuit Judge, concurring in part and dissenting in part). Judge Wood's dissent details facts (in addition to the facts specifically noted in the following pages of this petition) in the record and reasonable inferences to be drawn from them, based upon citations to the record from the argument portion of Albrechtsen's appellate brief. *Id.* Judge Wood's discussion of the facts is extremely important to an understanding of the merits of this petition. Because it is reproduced in its entirety at App. 9a - App. 16a, it will not be repeated here. The dissent explains why "it is apparent that there was sufficient evidence before the jury to support its verdict in favor of Albrechtsen" and how the majority failed "to assess what is before us fairly and to respect both the perspective of the trial judge and the role of the jury in civil litigation." App. 9a.

On May 3, 2002, petitioner Albrechtsen filed the Brief of Plaintiff-Appellee-Cross-Appellant with the court of appeals. Near the beginning of the brief, after the Statement of the Case, Albrechtsen stated as follows:

Statement of Facts

> The "Statement of Relevant Facts" by defendant Board of Regents of the University of Wisconsin System in its brief is tainted by argument and rhetoric. It demonstrates the board's proclivity for rearguing the facts on appeal, as they had been argued previously in pre-trial motions and during trial.
>
> A reasonably concise statement of the basic relevant facts is set forth by the district court in its Memorandum and Order ruling on the board's motion for summary judgment. App. 32-36. Plaintiff-appellee-cross-appellant Steven J. *Albrechtsen will cite relevant facts in the following argument, with appropriate references to the record.*

Brief of Appellee, at 2 (emphasis added). In the argument section of the brief, Albrechtsen demonstrated that there was substantial evidence to support the jury's verdict regarding all relevant issues, including issues of credibility and pretext. He relayed facts with specific citations to the record. Relevant excerpts from the brief include the following:

> Dr. Albrechtsen testified in detail about his original complaint to the chancellor regarding

discrimination against him as a male in 1989, Tr. 1-136, in lengthy and detailed testimony regarding his history of difficulties, Tr. 1-121 to 1-187. Testimony regarding the January 10, 1997 letter was only a fleeting part of that testimony. Tr. 1-155. As Judge Shabaz acknowledged during the trial, the letter was but a part of "the ongoing conduct which this Court is familiar with and does believe is appropriate in order to allow [plaintiff's] claim to proceed." Tr. 1-227. . . .

The jury easily could have rested exclusively upon the testimony of Dr. Albrechtsen, who testified clearly and convincingly on the subject of the workshops (Tr. 1-21 to 1-33); the machinations involved in denying the teaching of the courses, the spurious issue of the résumé, and his qualifications for teaching the courses (Tr. 1-140 to 1-149); the ins and outs of the merit pay dispute and how Dr. Clayton changed the process in order to get a result in which he would get a lower merit pay than others in the department (Tr. 1-151 to 1-154); the difficulties he had in freely associating with members of the department who respected and appreciated him and the price they regularly paid for their friendship and collegiality (Tr. 1-56 to 1-60); and specific details regarding the merit pay issue and the teaching of courses that was important to the jury's analysis of the pretext issue (Tr. 1-160 to 1-187).

Other witnesses corroborated the plaintiff's testimony. For example, Professor Richard Schauer verified the close working relationship

of Clayton, Barnett, and Greenhill and their hostility toward the plaintiff, which was palpable (Tr. 1-96 to 1-202).

Cross-examination of defendants themselves adduced testimony harmful to the board. For example, Dr. Clayton acknowledged Dr. Albrechtsen and his closest personal friend, Dr. Barak, received the lowest merit pay of any people in the department (Tr. 1-303). She also admitted she had personally approved the teaching of the same summer classes by Dr. Albrechtsen in previous years (Tr. 1-310 to 1-311). Dr. Barnett acknowledged that he oversaw the merit pay process in 1998 (Tr. 2-48); that he knew plaintiff complained about being discriminated and retaliated against; that he knew plaintiff was concerned about other members of the faculty who were associates of his also being victimized (Tr. 2-57); that he never actually talked to the plaintiff about his qualification for teaching the denied courses (Tr. 2-65); that once a course is approved it is all right to teach it again thereafter and Dr. Clayton was chair when that process was abruptly halted regarding Dr. Albrechtsen (Tr. 2-73); and that he did not know of any policy allegedly violated by Dr. Albrechtsen regarding the alleged problematic student evaluations (Tr. 2-74). Dr. Greenhill admitted that Dr. Clayton's demand that Dr. Albrechtsen handle student evaluations a certain way could not be excused or explained by a written directive from him, as Clayton had contended (Tr. 2-143 to 2-145); that Dr. Clayton had responsibility for

> providing an updated résumé regarding Dr. Albrechtsen (Tr. 2-177); that the alleged failure of Dr. Albrechtsen to provide an updated résumé (which was already on file with Dr. Clayton as department chair) was the only reason Dr. Albrechtsen was not allowed to teach the summer courses (Tr. 2-180); that he had received, read, and knew the contents of the January 10, 1997 letter (Tr. 2-183 to 2-184); and that he did not attempt to take any effective action regarding Dr. Albrechtsen's complaints of unlawful discrimination and retaliation (Tr. 2-184 to 2-185).

Brief of Appellee at 9-11.

The majority of the panel of the court of appeals disregarded the evidence cited by Albrechtsen and decided the case on the basis of a review of the evidence in a light most favorable to the University. *See* App. 9a - App.16a (Diane P. Wood, Circuit Judge, concurring in part and dissenting in part). The court professed that, "If a statement of facts appeared somewhere else in the brief, . . . we would give it the same effect as one with the proper caption and in the proper place." *Id.*, *citing* Fed. R. App. P. 28(a). However, despite that assertion, the court ruled instead that "Albrechtsen has effectively provided no statement of facts at all." App. 3a. Rather than acknowledging the evidence cited by the appellee, the court said, "When the appellee chooses to omit a statement of facts, the court of appeals may decide the case on the basis of the facts that the appellant supplied." It said, "The court treats *silence* as assent to the moving party's presentation." *Id* (emphasis added). Although the majority stated in their opinion that they would "approach this appeal on the assumption that the facts are those that the

University has recounted, plus those in the transcript pages to which Albrechtsen's brief directly refers," App. 5a, their discussion of the facts belies that assertion and demonstrates that they considered only the facts recounted by the respondent.[1]

The citations to the record in the above portions of Albrechtsen's brief point directly to evidence relevant to the dispositive issue in the panel decision – the question of whether the retaliation suffered by Albrechtsen in 1998 was causally related to his previous complaints of sex discrimination or his previous complaints of retaliation for complaining about sex discrimination. Reference to those pages of the trial transcript reveals the following information.

---

1. Remarkably, the court was willing to "approach this appeal on the assumption that the facts are those that the University has recounted" despite the fact that it found the "statement of facts" in the University's brief was out of compliance with Fed. R. App. P. 28(a)(7) and the associated Circuit Rule 28(c). App. 3a. The panel said that respondent failed to comply with the requirement under those rules that the statement of facts "shall be a fair summary without argument or comment" and that "[n]o fact shall be stated in this part of the brief unless it is supported by a reference to the page or pages of the record or the appendix where the fact appears." *Id.* The court said,

> Instead of summarizing the record so that we could learn what inferences in Albrechtsen's favor the evidence fairly supports, the University's "statement of facts" is a tendentious recap of the defense case. No opportunity to disparage Albrechtsen's position is missed, and facts that might support his position do not see the light of day.

Id.

Albrechtsen laid out his personal background and occupational and educational history, including obtaining a Ph.D. in physiology and biophysics at Colorado State University where he went on to serve as assistant to the president of the university before being hired by the University of Wisconsin-Whitewater in 1983. Tr. 1-17 to 1-19. He described his history at Whitewater where he achieved tenure, was promoted to assistant professor on July 1, 1991, and promoted to full professor July 1, 1995. Tr. 1-121 to 1-123. He testified to having taught courses in Electrocardiography and Wilderness Medicine and a course entitled Exercise Lite, beginning in the summer of 1994. Tr. 1-124 to 1-129. He described how things began to change regarding his teaching of those courses in the summer of 1997 and the general circumstances related to his ultimately being barred from teaching those courses after the Chancellor, defendant H. Gaylon Greenhill, issued a memorandum dated March 17, 1998. Tr. 1-129 to 1-135.

Albrechtsen testified that he first began to complain about "bias against males in my department" in November of 1989 in a written complaint to the chancellor. Tr. 1-136, lines 4-16. He was asked whether he had "occasion to complain on that subject" thereafter, and he testified that he had made "such a complaint" in January of 1995 to the chancellor. Tr. 1-136, line 22, to 1-137, line 10. When asked whether he complained "to anybody in an official capacity at the University about such a similar complaint again after the time in 1995," he said he had done so "about 1998." Tr. 1-137, lines 14-21.

Albrechtsen said he filed "a written complaint regarding the subject of gender-based discrimination with Chancellor Greenhill on January 10, 1997." Tr. 1-155, lines 14-21.

He testified, "I was complaining about a pattern and practice of discrimination against males and against heterosexual women, specifically people who were associated with me." Tr. 1-155, line 24, to 1-156, line 1. He talked about matters he complained of in the 1997 letter, and he identified Nancy Krattiger-Ziltener, Jane Sandusky, Mary Anne Hedrich, and Karen Barak as heterosexual females who had become professional or personal friends of his within his department. Tr. 1-156 to 1-160. He gave specifics as to ways in which those female associates were harmed by defendant L. Brenda Clayton and two other women, Dr. Kirk and Dr. Dailey who acted in concert with Dr. Clayton. *Id.*

Clayton had become chairperson of the department in May of 1996. Tr. 1-142. She had approved Albrechtsen's teaching of the relevant courses in the summer of 1996 and the summer of 1997. Tr. 1-142 to 1-144. On March 4, 1998, she wrote a memo to defendant Jeffrey C. Barnett, the Dean with authority over her department, questioning whether Albrechtsen should be allowed to continue to teach Electrocardiography and Wilderness Medicine. Tr. 1-144. On the basis of actions taken by Clayton and Barnett, Greenhill issued the memo putting a stop to Albrechtsen's laboratory activities and to the prospect of his teaching those courses again in the summer of 1998. *Id.*

Albrechtsen testified of his surprise that Greenhill wanted an updated résumé and that he was specifically asked for one by Barnett, because "résumés of faculty members are generally available in departments and colleges." Tr. 1-146, lines 11-12. He stated that he had a résumé on file with his department and that "it was routine to keep updated résumés on file for all faculty members." *Id.* at lines 13-18. He said, "I always keep an updated

résumé," and the dean would have "had access to the updated résumé that was kept by [Albrechtsen's] department at his college." *Id.* at lines 20-24.

Albrechtsen said, "I thought it was clear from the chancellor's original memorandum in 1998 what he wanted done and . . . I was not in a position to do what he wanted done" to allow for his laboratory activities and teaching prospects to go forward. Tr. 1-147, lines 11-14. He testified that there had already been a review of his qualifications the previous year and that those who had conducted the review "did apparently review my résumé but they obtained that résumé from the department and not from me." Tr. 1-148, lines 4-9. That previous process of outside review had been set in motion by Chancellor Greenhill. *Id.* at lines 16-18.

Albrechtsen also testified about the process regarding merit pay considerations for the year 1998, which began in November of 1997. Tr. 1-151. He said that, when merit pay had previously been decided in 1995, he was at the top of the department, ranked number one. Tr. 1-152, line 20, to 1-153, line 3. In the merit pay process that occurred during the 1997-98 period, Chairperson Clayton made changes in the paperwork and how people were to report things and "changed the nature of how people were evaluated and who did the evaluation." Tr. 1-153, lines 18-20. The effect of those changes, which included reducing the evaluators from 11 to three (herself and Drs. Dailey and Kirk), was to render Albrechtsen and his close personal friend, Dr. Barak, at the very bottom of the merit pay pool. Tr. 1-153, line 24, to 1-154, line 13; 1-159, line 15, to 1-160, line 20.

The next time the merit pay issue arose, in the late fall of 1999 or the early spring of 2000, Clayton was no longer

chairperson, and the new interim chairperson set the process back the way it had previously been, making it fair again. Tr. 1-160, line 22, to 1-162, line 7. Had the proper criteria been employed in the proper manner, as had occurred both before and after the 1998 merit process, Albrechtsen's 1998 merit increase would have been the highest in the department, instead of the lowest. Tr. 1-164, line 18, to 1-165, line 10. Albrechtsen had followed the standard practice regarding student evaluations from 1991 until 1998, and nobody inside Albrechtsen's department or inside the University had ever raised a concern about his student evaluations until Clayton did in the spring of 1998 in relation to the merit pay issue. Tr. 2-193, line 23, to 2-194, line 3.

Reasons for Granting the Writ

I. In this Case the Court of Appeals Has So Far Departed from the Accepted and Usual Course of Judicial Proceedings as to Call for an Exercise of this Court's Supervisory Power.

When "a United States court of appeals . . . has so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's supervisory power," it may be a compelling reason to grant a petition for a writ of certiorari. Sup. Ct. R. 10(a). The Court sometimes is called upon to exercise its superintending authority to ensure the Constitution is upheld and justice is done. *See, e.g.*, *Mapp v. Ohio*, 367 U.S. 643 (1961). Respectfully, this is such a case.

What happened to the petitioner on appeal in this case is the equivalent of playing golf on a sunny day and getting struck by lightening. The correction of what seems to be a

manifest injustice is not, in and of itself, a compelling reason for this honorable Court to grant the petition. However, the precedent set by the majority opinion is dangerous, and it is likely to be followed by other federal and state courts unless the Court exercises its supervisory power to ensure otherwise.

The decision of the court of appeals demonstrates a real need for the Court to better define the role of a United States court of appeals when it reviews a decision of a district court and to more clearly establish the standard for setting aside a verdict after a district court has approved entry of the judgment on the basis of the verdict and denied post-verdict motions under Fed. R. Civ. P. 50(b) and 59. The proper role of a court of appeals under the Seventh Amendment is obfuscated, when the Reexamination Clause is violated – as it has been blatantly in the case at bar – and nothing is done about it.[2] This case invites future decisions to follow its lead and, therefore, calls upon the Court to close the door that has been opened.

As was true in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000), the case at bar presents a situation in which the court of appeals has, for whatever reason, tested basic principles that would seem so clear as to not require reiteration. Although a court may not credit testimony by witnesses for the appellant over contrary testimony by witnesses for the appellee and may not resolve disputes about what inferences should be drawn from the evidence or attempt to balance the weight of the evidence adduced at trial, remarkably the court of appeals did all of that in the case at bar.

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2. The decision of the court of appeals amounts to what Justice Harlan once referred to as "a voice of power, not of reason." *Mapp v. Ohio*, 367 U.S. 643, 686 (Harlan, J., dissenting).

As Judge Wood in dissent straightforwardly stated,

> we have a responsibility to assess what is before us fairly and to respect both the perspective of the trial judge and the role of the jury in civil litigation, . . . [and] [w]hen one does this, it is apparent that there was sufficient evidence before the jury to support its verdict in favor of Albrechtsen.

App. 9a. Therefore, the court of appeals decision is at odds with the Reexamination Clause of the Seventh Amendment and its requirement that deference be given to a trial judge's ruling to deny a motion for a new trial and, especially, that deference also be given to the decision of the trial judge *and* jury on a motion for judgment as a matter of law. *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 435-36 (1996); *Reeves*, 530 U.S. at 150-53. In that sense the decision in this case conflicts with the relevant decisions of all the circuits as well as this Court.

It appears that the court of appeals determined that the circumstances of this case imposed upon petitioner a greater burden than the two-step burden to submit evidence to establish a prima facie case and to submit evidence from which a rational fact-finder could conclude that the employer's proffered explanation for its actions was false. Justice Ginsberg predicted this situation might arise. *Reeves*, 530 U.S. at 154-55 (Ginsberg, J., concurring). She said, "it may be incumbent on the Court, in an appropriate case, to define more precisely the circumstances in which plaintiffs will be required to submit evidence beyond these two

categories in order to survive a motion for judgment as a matter of law." *Id.* Review of this case would clarify whether its circumstances actually do, or do not, require more of the petitioner than other plaintiffs or appellees.

The lesson of *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993), is that the question of whether a defendant was in fact motivated by discrimination is for the finder of fact to decide. *Reeves*, 530 U.S. at 154-55 (Ginsberg, J., concurring). However, the decision of the court of appeals holds that there is justification for abandoning that principle. It appears that it would be wise for the Court to set the matter straight.

II. The Court of Appeals Has Decided an Important Federal Question in a Way That Conflicts with Relevant Decisions of this Court, Such as *Reeves v. Sanderson Plumbing Products, Inc.*; *Gasperini v. Center for Humanities, Inc.*; *St. Mary's Honor Center v. Hicks;* and *Anderson v. Liberty Lobby, Inc.*

When "a United States court of appeals . . . has decided an important federal question in a way that conflicts with relevant decisions of this Court," it also may be seen as a compelling reason to grant a petition for a writ of certiorari. Sup. Ct. R. 10(c). The court of appeals "decision to second-guess the verdict of a jury that heard all the testimony pertaining to Albrechtsen's claim and concluded that he was the victim of unlawful discrimination," App. 16a, presents such a case. It is easy to see that the majority opinion suggests to those who would discriminate a strategy of waiting patiently to retaliate against one who legitimately complains of unlawful discrimination, so that enough time passes between the complaint and the retaliation to ensure a defense

as a matter of law. Yet, such a defense, under the aegis of the *Albrechtsen* decision as it now stands, would be in conflict with important precedents of the Court.

Reeves; *Gasperini*; *Hicks*; and *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), are four salient examples of such cases. The court of appeals decision flies in the face of the mandate of *Reeves* that the court "must disregard all evidence favorable to the moving party that the jury is not required to believe" and "must draw all reasonable inferences in favor of the non-moving party . . . and . . . not make credibility determinations or weigh the evidence." 530 U.S. at 150-51. *See also Anderson*, 477 U.S. at 255 (same). The decision also cannot pass muster under the abuse of discretion standard, as is required in order to comport with the Reexamination Clause of the Seventh Amendment. *See Gasperini*, 518 U.S. at 435 ("We must give the benefit of every doubt to the judgment of the trial judge" unless there has been an abuse of discretion). The decision further conflicts with the Court's strong reiteration in *Hicks* of the necessity for a determination by the fact-finder (*i.e.* jury) of the ultimate question of whether unlawful discrimination has occurred. 509 U.S. at 514.

Although the petitioner may deserve the victory he fought for so steadfastly over much of his professional career and finally won in the district court, that is not what is most compelling about this case. Rather, it is most important that the respondent be subjected to the judgment entered against it – fair and square – by the district court on the basis of the unanimous verdict of a jury, thereby properly holding the University to account under our nation's anti-discrimination laws. Judge Wood's opinion captures that reality in a manner consistent with all applicable precedents of the Supreme

Court and the various courts of appeals. In this case, the Court has an opportunity both to serve jurisprudence and to correct a manifest injustice for *both* parties.

Conclusion

For the foregoing reasons, petitioner Steven J. Albrechtsen requests that the Court grant the Petition for a Writ of Certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DATED AND DECIDED OCTOBER 23, 2002

In the
UNITED STATES COURT OF APPEALS
For the Seventh Circuit

Nos. 01-3577, 01-3791 & 01-4197

STEVEN J. ALBRECHTSEN,

Plaintiff-Appellee, Cross-Appellant,

v.

BOARD OF REGENTS OF THE UNIVERSITY OF WISCONSIN SYSTEM,

Defendant-Appellant, Cross-Appellee,

and

H. GAYLON GREENHILL, *et al.*,

Defendants-Appellees.

Appeals from the United States District Court
for the Western District of Wisconsin.
No. 00-C-597-S—**John C. Shabaz**, *Judge.*

ARGUED SEPTEMBER 6, 2002—DECIDED OCTOBER 23, 2002

Before POSNER, EASTERBROOK, and DIANE P. WOOD, *Circuit Judges.*

Appendix A

EASTERBROOK, *Circuit Judge.* During the spring of 1998 Steven Albrechtsen, a professor in the Department of Health, Physical Education, Recreation, and Coaching at the University of Wisconsin-Whitewater, suffered two reverses: he was told that he could not teach two particular summer workshops that year (losing about $1,210 in pay), and he did not receive an $86 merit increase in his salary for the next year. He responded with this lawsuit under Title VII of the Civil Rights Act of 1964. Albrechtsen contended that the Department had discriminated against him on account of sex and retaliated for his support of other teachers who he believed to have been the victims of sex discrimination. He had some other claims as well, but the district judge removed them before the start of trial. A jury decided that Albrechtsen was the victim of retaliation but not sex discrimination, and it awarded him a total of $293,840 in damages (when topped up with four years' back pay calculated by the court). The bulk of this ($250,000) represented mental distress. Sensing that this number had been drawn from a hat, the district judge produced a smaller container and drew out $100,000 to replace it; Albrechtsen accepted the remittitur and a final award of $143,840, to which the judge added about $118,000 in attorneys' fees.

Both sides have appealed. Albrechtsen's requires no discussion beyond stating that we agree with the district judge's decision with respect to all of the claims resolved before trial. The University's appeal presents nine contentions, counting the major subdivisions, but we need consider only one: whether the evidence supports the jury's conclusion that the University retaliated against Albrechtsen for taking a stand against sex discrimination.

Appendix A

After a trial, the evidence (including all plausible inferences) normally must be viewed in the light most favorable to the verdict. That's a blackletter principle, but what is normal does not always hold. The norm supposes that the parties have presented that evidence to the court of appeals in a digestible fashion, so that we may evaluate the record's contents. Both sides fell down at that task. The University failed to comply with Circuit Rule 28(c): "The statement of facts required by Fed. R. App. P. 28(a)(7) shall be a fair summary without argument or comment. No fact shall be stated in this part of the brief unless it is supported by a reference to the page or pages of the record or the appendix where that fact appears." Instead of summarizing the record so that we could learn what inferences in Albrechtsen's favor the evidence fairly supports, the University's "statement of facts" is a tendentious recap of the defense case. No opportunity to disparage Albrechtsen's position is missed, and facts that might support his position do not see the light of day. When his turn came, however, Albrechtsen did—nothing. Instead of marshaling the facts that support the verdict, the half-page portion of the brief captioned "Statement of Facts" just refers us to the district court's opinion denying the University's motion for summary judgment. This is bad on three counts: first, appellate briefs may not incorporate other documents by reference, see *Fleming v. Kane County*, 855 F.2d 496, 498 (7th Cir. 1988); *Hunter v. Allis-Chalmers Corp.*, 797 F.2d 1417, 1430 (7th Cir. 1986); second, we need to know what evidence was presented *at* trial, not whether the district judge thought that there was an issue *for* trial; third, the district court's overview of the pretrial situation does not contain a single reference to the record. Albrechtsen has effectively provided no statement of facts at all.

Appendix A

An appellee is entitled to pretermit a statement of facts "unless . . . dissatisfied with the appellant's statement". Fed. R. Civ. P. 28(b). When the appellee chooses to omit a statement of facts, the court of appeals may decide the case on the basis of the facts that the appellant supplied. See *Investment Funds Corp. v. Bomar*, 306 F.2d 32 (5th Cir. 1962). Just as many district courts require paragraph-by-paragraph responses to facts recited in support of motions for summary judgment, appellate courts require narrative responses. The effect of omission is the same in either event—the court treats silence as assent to the moving party's presentation. See, e.g., *Bradley v. Work*, 154 F.3d 704, 707-08 (7th Cir. 1998); *Little v. Cox's Supermarkets*, 71 F.3d 637, 641 (7th Cir. 1995).

This is not to say that we have a fetish for section headings. If a statement of facts appeared somewhere else in the brief, say as an introduction to a section with the caption "Argument," we would give it the same effect as one with the proper caption and in the proper place. See Fed. R. App. P. 28(a). Yet Albrechtsen's brief falls down here too. His entire argument devoted to the sufficiency of the evidence fits within 8 pages, only a quarter of the space the University dedicated to laying out its version of the facts, and it does not furnish any detail. Most of the references in this section are to the administrative charge of discrimination, which lacks evidentiary value. When asked at oral argument what evidence he was relying on, counsel replied: "The entire record." That will not do, nor will counsel's fallback invitation that we read all of Albrechtsen's testimony. Courts are entitled to assistance from counsel, and an invitation to search without guidance is no more useful than a litigant's

request to a district court at the summary judgment stage to paw through the assembled discovery material. "Judges are not like pigs, hunting for truffles buried in" the record. *United States v. Dunkel*, 927 F.2d 955, 956 (7th Cir. 1991). We therefore approach this appeal on the assumption that the facts are those that the University has recounted, plus those in the transcript pages to which Albrechtsen's brief directly refers.

From that perspective, this is an easy case. To show that the University violated Title VII, Albrechtsen had to establish that (a) he complained about sex discrimination; (b) the persons who made the decisions in 1998 knew about those complaints; and (c) the adverse actions in 1998 occurred because of the complaints (in other words, that, if Albrechtsen had not complained, and all else had remained the same, he would have received a raise and been allowed to teach the workshops). As the University recounts the story, the only complaint in the record is a letter that Albrechtsen wrote in 1997, and this letter—though full of protests about the management of the Department—does not contain the words "sex" or "gender." Instead the letter contends that the Department is mistreating *all* members of the faculty (and picking on Albrechtsen in particular), a position that is incompatible with a contention that men have been preferred over women, or the reverse. We read that letter the same way the University does, and no reasonable juror could understand it otherwise. If there has been no protest about sex discrimination, there cannot have been any prohibited retaliation.

The University adds that it had lawful reasons for acting as it did. A new department chair asked faculty members to submit student evaluations for use in the merit-pay process. Albrechtsen refused to do this, and the chair responded by withholding any merit pay increase. The new chair asked Albrechtsen for a current curriculum vitae so that she could assess whether his knowledge encompassed the subjects he proposed to teach ("Wilderness Medicine" and "Electrocardiography"); again Albrechtsen refused, and again the chair followed Albrechtsen's "no" with a "no" of her own. Albrechtsen *concedes* that he refused to furnish a current C.V. or hand over student evaluations; he says that he viewed the requests as harassing and that the Department should have known his qualifications to teach the workshops and receive a merit increase. Maybe—though new administrators may want to verify for themselves what their predecessors supposedly knew. Often people come to management posts planning to change the way things are done, so the fact that Albrechtsen had taught these workshops, and received merit increases, in years past does not imply that the new chair must have been discriminating or retaliating when she asked for information and concluded that a truculent faculty member should not receive a reward. With only the January 1997 letter to go on it would be impossible for a jury reasonably to conclude that the decisions in spring 1998 were retaliation rather than a use of the broom that new managers often bring to office.

Albrechtsen tells us that the protected speech occurred between 1987 and 1991, when he made numerous protests about sex discrimination. By his lights, what the 1997 letter does is imply that the Department would not have forgotten

these events. Yet Albrechtsen does not point to any example of his pre-1997 protests in the record. The few references in his brief to the trial record yield only allusions to what may have happened. Because the record does not establish the contents of these communications—at least, Albrechtsen's references did not enable us to find them—it is hard to see how the evidence could be sufficient. And the possibility that Albrechtsen uttered more recent complaints is not an assertion that Albrechtsen made on the stand. The "long litany of stuff" that the University's chancellor mentioned (without detail) during his testimony lacks any date or content; Albrechtsen did not attempt at trial or on appeal to explain what this "stuff" might be. Nor could we find any case in which a claim has been held sufficient despite lack of *any* detail about who said what to whom and when. Albrechtsen has not substantiated any claim that the University retaliated against oral statements made roughly contemporaneously with the 1997 letter. That leaves the earlier protests.

It would be bizarre for an academic department to wait most of a decade, promoting the faculty member repeatedly (Albrechtsen received tenure in 1989, was promoted to associate professor in 1991 and to full professor in 1995), and allowing him to teach the summer workshops of his choice, only to "retaliate" by withholding a raise and canceling two workshops in 1998. If the Department had it in for him all the while, why the promotions and the substantial raises that went with them? We do not know of any case in which a court has found (or permitted a jury to find) that action so long deferred after the provocation, despite the possibility of immediate retaliation (an important qualification, see *McGuire v. Springfield*, 280 F.3d 794, 796

(7th Cir. 2002)), could be deemed a consequence of that provocation. To the contrary, we regularly sustain summary judgments based on the view that a year's gap between the act and the supposed consequence shows that a causal relation is too unlikely to support a decision by the preponderance of the evidence. See, e.g., *Lalvani v. Cook County*, 269 F.3d 785, 790-91 (7th Cir. 2001); *Horwitz v. Board of Education*, 260 F.3d 602, 612-16 (7th Cir. 2001). Here the gap was at least seven years. A contention that the events of 1987 to 1991 caused the decisions of 1998 is too farfetched to be the basis of a money judgment.

REVERSED

Appendix A

DIANE P. WOOD, *Circuit Judge*, concurring in part and dissenting in part. A jury heard all the evidence about Steven Albrechtsen's claim of retaliation and sex discrimination in violation of Title VII at the hands of the University of Wisconsin-Whitewater (UWW), and it decided that Albrechtsen had proven his retaliation case. Largely because Albrechtsen's lawyer filed a poor brief in this court, the majority has decided to overturn the jury's verdict and order judgment for the University. While I agree that the briefs filed by both parties in this appeal were seriously flawed—the University's brief is tendentious, ignores the proper standard of review for jury verdicts, misleadingly disregards facts that were unfavorable to its position, and is thus generally unreliable, while Albrechtsen's brief is so condensed as to be almost (but not quite entirely, as I explain below) devoid of useful information in support of the judgment—we have a responsibility to assess what is before us fairly and to respect both the perspective of the trial judge and the role of the jury in civil litigation. When one does this, it is apparent that there was sufficient evidence before the jury to support its verdict in favor of Albrechtsen. I therefore respectfully dissent.

As the majority notes, *ante* at 4, in order to show that the University violated the anti-retaliation provisions of Title VII, Albrechtsen had to establish that

> (a) he complained about sex discrimination; (b) the persons who made the decisions in 1998 knew about those complaints; and (c) the adverse actions in 1998 occurred because of the complaints.

The majority's first misstep is to accept the University's position that the *only* instance of a complaint on which Albrechtsen was

relying was to be found in a letter that he wrote on January 10, 1997, to H. Gaylon Greenhill, then the Chancellor of UWW. The University made the same argument before the district court, and the district court rejected this position in its Memorandum and Order denying (apart from the remittitur to which the majority refers) the University's post-verdict motions under Fed. R. Civ. P. 50(b) and 59. As the district court's order (to which Albrechtsen refers specifically in his brief) makes clear, the January 10 letter was not the only evidence of a complaint before the jury:

> Defendant [*i.e.*, the University] contends that the Court erred in allowing plaintiff to attribute retaliation to the January 10, 1997 letter rather than the events before 1991 expressly articulated in his EEOC charge. This letter was properly admitted to show defendant's knowledge that plaintiff had opposed gender discrimination.
>
> Defendant contends that this letter does not oppose gender discrimination. The Court disagrees. The letter written by plaintiff to H. Gaylon Greenhill, the Chancellor of UWW, states, "These members of the tenured faculty have repeatedly violated the rights of individuals, acted without regard for law and procedure and perpetuated an extremely hostile work environment in Williams Center." This statement in conjunction with plaintiff's past complaints provided notice to defendant that plaintiff opposed gender discrimination.

Brief for Appellant, App. 17.

Appendix A

At oral argument, counsel for the University conceded that protection for Title VII purposes did not extend only to written documents. Oral complaints of discrimination count too, and evidence of such oral complaints was an important part of Albrechtsen's case. The district court properly recognized this, when it referred to "plaintiff's past complaints" to give context to the January 10 letter.

Moreover, there was evidence in the record in support of Albrechtsen's position—to which he referred in his brief—of both the oral complaints and the fact that they were sufficient to make the responsible defendants aware of his position. For example, the brief cites to Chancellor Greenhill's testimony on cross-examination, Transcript at 2-180, in support of the verdict. If one turns to that page and the one that immediately follows it in the transcript, one finds the following exchange:

> Q [Mr. Lasker, Albrechtsen's lawyer]: You testified on direct examination, Dr. Greenhill, that sex discrimination was a recent issue. What did you mean by that?
>
> A [Greenhill]: It was recent in the sense of it being raised by Dr. Albrechtsen. I mean the question of sex discrimination in America is, is, been around. But—
>
> Q: So what do you mean by your asserting that Dr. Albrechtsen's allegation of sex discrimination was recently made?

> A: That it isn't that—it was late in this long litany of stuff, that, of complaints and such that I recall any kind of reference to sex discrimination. It may have been raised by other—to other people, but I, not to me.

Two pages later, at Tr. 2-183, which is also cited in Albrechtsen's brief, Chancellor Greenhill acknowledged that he received the January 10 letter.

This exchange is important in a number of ways. First, it shows that Albrechtsen indeed did complain expressly about sex discrimination. Second, it shows that the official with final authority over UWW knew about those complaints. Third, it shows that the complaints were recent. Contrary to the majority's assumption and the University's representation, the complaints occurred very close in time to the retaliatory actions about which Albrechtsen was complaining. These points correspond exactly to the three elements the majority acknowledges Albrechtsen had to prove. There was nothing irrational about the jury's decision to credit this testimony, to use it to illuminate ambiguous references in the January 10 letter, and to base its ruling for Albrechtsen on this evidence. The majority insists on looking at the letter in isolation, which is the only way that it can conclude that no reasonable juror could have understood it to be referring to sex discrimination (in any of its forms—direct, or harassment). That is not the way the evidence was presented to the jury, and the jurors were not required to put on blinders to the rest of the evidence when they considered the letter.

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The fact that Dean Barnett testified (in another reference furnished to us by Albrechtsen's lawyer) that he did not remember Albrechtsen's complaints is not dispositive. The exchange set forth below is equivocal, and the jury might have concluded that the Dean was not being fully forthcoming:

> Q: Were you [*i.e.*, Barnett] even aware that Steve Albrechtsen had in 1997 complained of sexual harassment?
>
> A: I do not remember those kinds of complaints. It is possible that in one of those complaints it was explicitly mentioned. I do know that he complained about individuals. I do know that he complained about being discriminated against. I do know that he complained that other members in the department were disadvantaged because of their association with him. I do not remember in particular that gender was an issue.

Tr. 2-57-58. Juries are sometimes skeptical about sudden failures of memory on the part of people who otherwise have a detailed recollection of the past.

The jury was also entitled to conclude that the University's supposed legitimate reasons for taking the actions it did were pretextual. True, a jury certainly could have found that the new department chair (Clayton) wanted fresh resumes from everyone on the faculty, but it equally might have found this to be pointless if Albrechtsen's *vita* had not changed since the last one on file. The jury might have found the University's newfound concern about his qualifications to

teach the summer classes to be phony, since he had taught the very same classes for the past three years, and since some of the very same people (Barnett and Greenhill) had approved the earlier offerings. Moreover, while the majority makes much of the fact that Clayton's sudden concern with Albrechtsen's qualifications could have been the "use of the broom" that new managers frequently bring to office, it might also have noted that Clayton became department chair in the fall of 1996, more than a year and a half before her March 1998 memorandum raising concerns about Albrechtsen's ability to teach the workshops. And while she testified on the stand that she was on a trip out of the country at the time of the 1996 approval of the workshops and that a deputy signed off on the workshops in her stead, a responsible department chair who was new to her post—and intent on using her new manager's broom—would almost certainly have reviewed all such documents upon her return. A reasonable jury might have concluded that Clayton had every opportunity to object to Albrechtsen's qualifications at the beginning of her tenure as department chair in 1996, but did not do so until the following academic year, in the spring of 1998, after a new round of complaints from Albrechtsen.

Furthermore, the courses—"Wilderness Medicine" and "Electrocardiography"— were within the scope of Albrechtsen's professional training. As the University concedes in its Reply Brief at 19, Albrechtsen "completed a doctoral degree in physiology and biophysics at Colorado State University, has expertise in cardiovascular physiology and environmental physiology, has teaching experience at UWW, Colorado State University and the University of Colorado, and is a member of the American College of Sports Medicine, the American

Association of Cardiovascular and Pulmonary Rehabilitation, the Wilderness Medical Society and other professional organizations." The jury also knew that the University's story about the reason for disapproving the 1998 offerings had shifted; at one point, it said that it received notice of his interest in teaching the classes too late to include them in the catalog, but later, it asserted that the lack of a resume and its concerns about his background were the real reason he could not present them. The jury reasonably could have found that these were just excuses, and that the University was instead retaliating for his complaints.

The majority also questions why the University would have decided to retaliate against Albrechtsen for his constant complaints when it had promoted him several times. *Ante* at 6. The answer is simple: it granted him tenure and later promoted him under threat of legal action based on his earlier complaints. Paragraph 404 of Albrechtsen's complaint sets forth the terms of a settlement agreement that Greenhill and he signed on June 9, 1993, that was designed to govern his promotion process. The 1993 agreement stated in part: "The parties affirm that any evaluation of Dr. Albrechtsen for promotion to rank of full professor shall be conducted under established criteria (involving teaching, research, and service) and procedures at the department, college, and university levels." The agreement was concluded right in the middle of the promotion process the majority outlines: tenure in 1989, promotion to associate professor in 1991, promotion to full professor in 1995. There is also ample evidence of continued complaints about discrimination over that entire course of time. Thus, the hostility that erupted in 1998 was not new; it merely took on a more virulent form, which

amounted to an adverse employment action in retaliation for the recent complaints of sex discrimination described by Chancellor Greenhill.

Because I would affirm the jury's verdict, as properly modified by the district court, I would also affirm the court's award of attorney's fees. I agree with the majority that there is no merit to Albrechtsen's cross-appeal, and so to that extent I concur in its opinion. I cannot, however, support this court's decision to second-guess the verdict of a jury that heard all the testimony pertaining to Albrechtsen's claim and concluded that he was the victim of unlawful retaliation. I therefore dissent.

A true Copy:

Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WISCONSIN DATED NOVEMBER 9, 2001 AND RECEIVED NOVEMBER 12, 2001

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

00-C-597-S

STEVEN J. ALBRECHTSEN,

Plaintiff,

v.

BOARD OF REGENTS OF THE UNIVERSITY OF WISCONSIN SYSTEM,

Defendant.

MEMORANDUM AND ORDER

Plaintiff Steven J. Albrechtsen commenced this civil action claiming that the Board of Regents of the University of Wisconsin System violated his rights under Title VII by discriminating against him on the basis of his gender and retaliating against him for opposing unlawful discrimination. He also claimed that the defendants H. Gaylon Greenhill, David J. Prior, Jeffrey C. Barnett, L. Brenda Clayton, Dianne C. Jones and William L. Myers violated the Racketeering Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-1968 (RICO),

and deprived him of his rights under the Equal Protection and Due Process Clauses of the Fourteenth Amendment, the First Amendment and Wisconsin Law. Plaintiff subsequently stipulated to the dismissal of all claims against the individual defendants except for his § 1983 Due Process claim. The Court dismissed the Due Process claim as a matter of law based on the absence of a protectible property interest, leaving only the Title VII claim for trial. Plaintiff prevailed at trial on the Title VII claim obtaining a jury verdict of liability and a judgment in the amount of $293,840. Following defendant's motion for a new trial plaintiff accepted a remittitur reducing the judgment to $143,840. The matter is presently before the Court on plaintiff's motion to recover his attorney's fees pursuant to 42 U.S.C. § 1988.

MEMORANDUM

Plaintiff seeks to recover $119,931 in attorneys fees. In support of the motion plaintiff's attorney represents that the request includes only time spent to advance "successful claims." Defendant opposes the award of fees on grounds that plaintiff's success was so limited that no fees should be awarded or the fees should be reduced, that reductions should be made to reflect fees incurred pursuing unsuccessful claims, that plaintiff's attorney engaged in misconduct at trial and that certain paralegal and law clerk expenses are unrecoverable. Plaintiff unquestionably succeeded on a significant issue achieving some of the benefit he sought and is therefore a prevailing party entitled to recover fees. *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983). Plaintiff established liability and obtained judgment, even after remittitur, in excess of $140,000. Defendant succeeded in

obtaining dismissal of largely duplicative causes of action. To suggest that plaintiff did not prevail in a significant way is untenable. There is no similarity between these circumstances and those that led to the refusal to award contractual fees in *Bankcard America, Inc. v. Universal Bancard Systems, Inc.*, 203 F.3d 477 (7th Cir. 2000).

There is also no significant issue on the appropriate lodestar amount from which the Court begins the attorneys fees analysis. No argument is advanced that hourly rates charged by plaintiff's counsel is unreasonable. The sole argument raised by defendant concerns two entries for paralegal time totaling less than one hour relating to the filing of briefs. Because such activities are reasonably within the parameters of allowable paralegal activities those fees are properly included. *See Missouri v. Jenkins*, 491 U.S. 274, 288 n. 10 (1989). A reduction in hours is appropriate, however, for time spent responding to the dismissed individual defendants' bill of costs. This activity is entirely unrelated to the action against the defendant against whom fees are charged. Accordingly, the requested fees are reduced by an amount reasonably attributed to those efforts of $1830, leaving a lodestar of $118,101.

The remaining issue is whether a downward adjustment is appropriate. A reduction may be appropriate where fees are claimed for time spent on unsuccessful claims which are distinctly different from the claims on which plaintiff succeeded. *Connolly v. National Sch. Bus Serv., Inc.*, 177 F.3d 593, 597-98 (7th Cir. 1999). Alternatively, a reduction may also be imposed when the fees are unreasonably high "in relation to the difficulty, stakes and outcome of the case." *Id.* Neither approach supports a significant reduction of fees.

Appendix B

All claims advanced by plaintiff were based on the same core of common facts and based on related legal theories. As a result, counsel's time will generally be spent on the litigation as a whole and a failure of the related claims is not the basis for exclusion of the fees. *Bryant v. City of Chicago*, 200 F.3d 1092, 1101 (7th Cir. 2000) (*quoting Spanish Action Comm. v. City of Chicago*, 811 F.2d 1129, 1133 (7th Cir. 1987)). In addition, counsel's affidavit expressly avers that hours are claimed only for work on successful claims and, in general, there is no reason to doubt this averment. This case is one where the same claims were stated in a variety of different legal theories and as such is not susceptible to reduction based on unsuccessful claims.

Viewed in terms of the overall success of the plaintiff in achieving his realistic goals in bringing the action it is clear that no further reduction is appropriate. Plaintiff has obtained a judgment in an amount which, by any reasonable measure, fully compensates him for the damages he sustained as a result of defendants' conduct. He has been compensated for his entire economic loss and has recovered an additional $100,000 for his emotional injury. He could have had no realistic expectation of greater recovery. There is no basis to reduce the lodestar for lack of success based on the nature of the case, the expectations from the outset and the result obtained.

Defendant also argues for a reduction in fees based on plaintiff's counsel's alleged inappropriate conduct at trial, as noted by the Court in its decision to grant a new trial and alternative remittitur on the issue of damages. Case law does not support reducing an award of attorney's fees as a penalty

for litigation tactics. Ironically, *Lynch v. City Milwaukee*, 747 F.2d 423 (7th Cir. 1984), which defendant relies upon to support its punitive reduction expressly rejects such an approach noting that any reduction would have to bear a relationship to the amount of time wasted because of the conduct. The Court recognized that there was not support "for the proposition that a percentage reduction in the lodestar should be imposed as a penalty." *Id.* at 429. Certainly, if inappropriate conduct had resulted in a new trial fees may be denied for that new trial. The remittitur having been accepted in lieu of a new trial, however, there is no basis for a reduction.

ORDER

IT IS ORDERED that attorneys fees are awarded plaintiff in the amount of $118,101 and that judgment be amended accordingly.

IT IS FURTHER ORDERED that taxation of costs is referred to the clerk for his determination in accordance with Rule 54(d)(1).

Entered this 9th day of November, 2001.

BY THE COURT:

s/ John C. Shabaz
JOHN C. SHABAZ
District Judge

APPENDIX C — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WISCONSIN DATED SEPTEMBER 7, 2001 AND RECEIVED SEPTEMBER 10, 2001

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

00-C-597-S

STEVEN J. ALBRECHTSEN,

Plaintiff,

v.

BOARD OF REGENTS OF THE
UNIVERSITY OF WISCONSIN SYSTEM,

Defendant.

MEMORANDUM AND ORDER

On June 28, 2001 judgment was entered in the above entitled matter in favor of the plaintiff Steven J. Albrechtsen against defendant Board of Regents of the University of Wisconsin System in the amount of $293,840.00 together with costs.

On July 10, 2001 defendant moved pursuant to Rules 50 and 59, Federal Rules of Civil Procedure, for judgment as a matter of law or in the alternative for a new trial. These motions have been fully briefed and are ready for decision.

Appendix C

FACTS

On June 1, 2001 the Court denied defendant's motion for summary judgment on plaintiff's gender discrimination and retaliation claims concerning the denial of a merit increase and teaching opportunities in 1998. The Court considered events occurring between November 1, 1997 and September 5, 1998 based on the filing dates of his EEOC complaints. The Court did, however, consider plaintiff's January 10, 1997 letter which was outside the time period as evidence of defendant's knowledge that plaintiff opposed gender discrimination.

Prior to trial defendant moved to exclude this letter. The Court allowed the admission of the letter as evidence of defendant's knowledge.

At trial evidence was admitted that plaintiff had opposed gender discrimination and that after he did so he was denied a merit increase and the opportunity to teach two summer workshops. Evidence was also submitted that retaliation was a motivating factor for defendant's decisions.

On June 26, 2001 the jury returned a verdict that defendant had retaliated against plaintiff for opposing gender discrimination by denying him a higher merit increase and the opportunity to teach two summer workshops in 1998. The jury found that defendant did not discriminate against plaintiff on the basis of his gender.

Appendix C

On June 27, 2001 the jury returned a damages verdict in the amounts of $27,000.00 for past income loss, $11,000.00 for future pay loss and $250,000.00 for emotional distress. The Court added $5840.00 for plaintiff's back pay for the workshops, and judgment was entered in favor of plaintiff for $293,840.00.

MEMORANDUM

Rule 50 Motion for Judgment as a Matter of Law

Defendant moves for judgment as a matter of law on the ground that there was not sufficient evidence to support the jury's verdict that plaintiff was denied a higher merit increase in 1998 and the opportunity to teach two summer workshops in retaliation for complaining about gender discrimination. In deciding a motion for judgment as a matter of law under Rule 50, Federal Rules of Civil Procedure, the Court must determine whether the evidence presented, combined with all reasonable inferences drawn therefrom, is sufficient to support the verdict when viewed in the light most favorable to the party against whom the motion is directed. *Haley v. Gross*, 86 F.3d 630, 632 (7th Cir. 1996).

The jury was instructed as follows:

> To prevail on his retaliation claim plaintiff must prove he engaged in statutorily protected expression; he suffered an adverse employment action and that there was a causal connection between the statutorily protected expression and the adverse employment action.

Appendix C

> Plaintiff must prove that retaliation was a motivating factor in the defendant's decisions to deny him the opportunity to teach two summer workshops and a higher merit increase in 1998. He need only prove that retaliation played a part in the defendant's actions, even though other factors may also have motivated the defendant's treatment of him.

Although irrelevant evidence was frequently offered by plaintiff at trial, nonetheless where objections were made they were sustained. Further, evidence was admitted that plaintiff engaged in protected expression by opposing gender discrimination and that he was subjected to adverse employment actions by the defendants when he was denied the opportunity to teach two summer workshops and a higher merit increase in 1998. From this a jury could reasonably conclude that retaliation was a motivating factor in defendant's decisions concerning plaintiff. Accordingly, defendant's motion for judgment as a matter of law will be denied.

Rule 59(a) Motion for New Trial

Liability

Defendant also seeks a new trial on the grounds that the jury's liability verdict was against the weight of the evidence, attorney misconduct was prejudicial and evidentiary error affected the outcome of the trial. In deciding defendant's motion for a new trial pursuant to Rule 59, Federal Rules of

Civil Procedure, the Court must consider whether the trial was unfair to the moving party. *Forester v. White*, 846 F. 2d 29 (7th Cir. 1988).

As discussed above there was sufficient evidence to support the jury's verdict. The jury's verdict was not against the weight of the evidence. Defendant's motion for a new trial on this ground will be denied.

Defendant contends that attorney misconduct affected the outcome of the trial. Although plaintiff's attorney often attempted to introduce evidence which was not relevant to the claims before the jury, this did not affect the outcome of the trial in the liability phase. Specifically, reference to the sexual orientation of female faculty members did not adversely affect the outcome of plaintiff's claim for gender discrimination. Defendant's motion for a new trial on this ground will be denied.

Defendant contends that the Court erred in allowing plaintiff to attribute retaliation to the January 10, 1997 letter rather than the events before 1991 expressly articulated in his EEOC charge. This letter was properly admitted to show defendant's knowledge that plaintiff had opposed gender discrimination.

Defendant contends that this letter does not oppose gender discrimination. The Court disagrees. The letter written by plaintiff to H. Gaylon Greenhill, the Chancellor of UWW, states, "These members of the tenured faculty have repeatedly violated the rights of individuals, acted without regard for law and procedure and perpetuated an extremely hostile work

environment, in the Williams Center." This statement in conjunction with plaintiff's past complaints provided notice to defendant that plaintiff opposed gender discrimination. Sufficient evidence was admitted in addition to the letter from which the jury could have concluded that defendant knew plaintiff opposed gender discrimination. Defendant's motion for a new trial on liability on this ground will be denied.

DAMAGES

Defendant also moves for a new trial on damages. The jury found that plaintiff was entitled to $27,000.00 for past income lost to date, $11,000.00 for future pay loss and $250,000.00 for emotional distress. The Court awarded plaintiff an additional $5,840.00 in back pay for the workshops. Evidence was admitted to support the jury's conclusions concerning lost income.

Defendant argues that there was not sufficient evidence admitted to support the jury's conclusion that plaintiff was entitled to $250,000.00 for emotional distress. Substantial evidence presented in the damages phase of trial was not relevant to the emotional distress which plaintiff claimed as a result of the defendant's actions found by the jury to be retaliatory. Plaintiff's counsel argued to the jury in closing and continues to argue in opposing defendant's motion for a new trial that plaintiff suffered emotional distress because of the ongoing activities of the defendant throughout his tenure at the University. Regardless of the Court's rulings to the contrary the jury was apparently persuaded by that irrelevant evidence which plaintiff persisted in bringing to its attention. The only actions which the jury should have

considered in determining plaintiff's emotional distress were the defendant's denial of his higher merit increase in 1998 and the opportunity to teach two summer workshops in 1998. The damages for emotional stress of $250,000.00 awarded plaintiff by the jury are shockingly excessive and not supported by the evidence to include plaintiff's testimony. An independent medical examination suggested no such monstrous award.

The evidence may support the benign and generous conclusion that plaintiff is entitled to $100,000.00 for emotional distress for defendant's actions. Accordingly, a remittitur will be entered where defendant is granted a new trial on damages subject to an award of $100,000.00 for emotional distress resulting in a total judgment of $143,840.00. In the event plaintiff fails to accept this remittitur by September 20, 2001 a new trial on damages will be immediately scheduled.

Plaintiff's pending motion for attorney fees will not be addressed until final judgment is entered.

ORDER

IT IS ORDERED that defendant's motion for judgment as a matter of law pursuant to Rule 50, Federal Rules of Civil Procedure, is DENIED.

IT IS FURTHER ORDERED that plaintiff's motion for a new trial on liability pursuant to Rule 59, Federal Rules of Civil Procedure, is DENIED.

Appendix C

IT IS FURTHER ORDERED that defendant's motion for a new trial on damages is GRANTED unless the aforesaid remittitur is accepted by plaintiff as set forth herein.

Entered this 7th day of September, 2001.

BY THE COURT:

s/ John C. Shabaz
JOHN C. SHABAZ
District Judge

APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DENYING PETITION FOR REHEARING AND REHEARING EN BANC DATED DECEMBER 13, 2002 AND RECEIVED DECEMBER 16, 2002

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

December 13, 2002

Before

Hon. RICHARD A. POSNER, Circuit Judge

Hon. FRANK H. EASTERBROOK, Circuit Judge

Hon. DIANE P. WOOD,* Circuit Judge

Nos. 01-3577, 01-3791
01-4197

STEVEN J. ALBRECHTSEN,

Plaintiff-Appellee, Cross-Appellant,

v.

BOARD OF REGENTS OF THE UNIVERSITY OF WISCONSIN SYSTEM,

Defendant-Appellant, Cross-Appellee,

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* Judge Diane P. Wood voted to grant rehearing.

Appendix D

and

H. GAYLON GREENHILL, *et al.*,

Defendants-Appellees.

Appeals from the United States District Court
for the Western District of Wisconsin.

No. 00-C-597-S
John C. Shabaz, *Judge.*

Order

Plaintiff-appellee, cross-appellant filed a petition for rehearing and rehearing en banc on November 6, 2002. No judge in regular active service has requested a vote on the petition for rehearing en banc, and a majority of the judges on the panel have voted to deny rehearing. The petition for rehearing is therefore DENIED.